

Administration in International Organizations

LAW OF PUBLIC CONTRACTS

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Suitability of firms (qualification and eligibility)

Only firms that meet certain minimum requirements may participate in the procurement process (qualitative selection). These minimum requirements are referred to in the Public Sector Directive (2014/24/EU) as:

- Exclusion grounds (mandatory and non-mandatory – Article 57)
- Selection criteria (may be imposed by contracting authorities – Article 58)

Exclusion grounds

Mandatory exclusion of convicted firms (Art. 57(1))

The Public Sector Directive requires contracting authorities to exclude from participation in a procurement procedure firms convicted of certain criminal activity in order to support the EU's own policies of combating these crimes. Contracting authorities must exclude an economic operator where they have established/are aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

- participation in a criminal organisation,
- corruption,
- fraud,
- terrorist offences,
- money laundering or terrorist financing,
- child labour and other forms of trafficking in human beings.

Exclusion grounds

Mandatory exclusion of firms (Art. 57(2))

Contracting authorities must exclude an economic operator from participation in procurement procedure when they are aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect.

Exclusion grounds

Non-mandatory exclusion grounds (Art. 57(4))

Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

- Professional honesty, solvency and reliability grounds
 - where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings;
 - is guilty of grave professional misconduct;
 - has entered into agreements aimed at distorting competition;
 - has shown significant or persistent deficiencies in the performance of a substantive requirement under prior public contracts which led to early termination, damages or other sanctions;
 - is guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria;
 - where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority

Exclusion grounds

Non-mandatory exclusion grounds (Art. 57(4))

Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

- Grounds related to equal treatment/transparency/competition and other:
 - where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures;
 - where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure cannot be remedied by other, less intrusive measures;
 - where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2).

Exclusion grounds

Self-cleaning defence against exclusion (Art. 57(6)):

Even if grounds for exclusion exist an economic operator may submit evidence that it has taken appropriate measures and thus is reliable despite the existence of such grounds (e.g. persons responsible for the misconduct or offence have been removed, compensation has been paid etc.). If the evidence submitted is considered sufficient, that economic operator should be admitted to the procurement procedure.

Selection criteria

Contracting authorities may (but are not required to) impose on economic operators certain criteria as requirements for participation. Those selection criteria allow contracting authorities to select firms which will be capable of performing a public contract awarded successfully and thus should be related and proportionate to the subject-matter of the contract. The criteria include:

- suitability to pursue the professional activity;
- economic and financial standing;
- technical and professional ability.

Selection criteria (Art. 58)

Suitability to pursue the professional activity

- Contracting authorities may require of economic operators that the latter are enrolled in trade or professional registers, possess necessary authorisations, are members of particular organisations if compliance with such requirements is necessary to perform a public contract.

Selection criteria (Art. 58)

Economic and financial standing

- Contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract (Art. 58(3))

Technical and professional ability

- Contracting authorities may impose requirements ensuring that economic operators have necessary skills, experience, human and technical resources necessary to perform the contract to an appropriate quality standard (Art. 58(4))

Award of the contract

Contract award criteria (see Art. 67)

In the contract award stage contracting authorities decide which of the qualified and responsive tenderers has submitted the best tender. The Public Sector Directive refers to such tender as the most economically advantageous tender. Choosing such tender may be based:

- solely on (the lowest) price or cost;
- on the best price-quality ratio criterion which includes price or cost and qualitative, environmental and/or social aspects

Abnormally low tenders (Art. 69)

- This concept refers to an offer that, because of its favourable terms, raises a suspicion that the provider will not be able to perform according to the terms offered;
- where an offer appears abnormally low, the contracting authority must seek a written explanation before rejecting it for that reason. The economic operator providing particularly favourable terms may have legitimate reasons for that and its offer should not be rejected as such;
- Contracting authority may (but is not obliged to) only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed;
- Contracting authorities must reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2);
- Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.